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No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *et al.*,

Petitioners,

v.

WILLIAM TWOMBLY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Second Circuit correctly found that a complaint stated a claim for an agreement in restraint of trade under Section 1 of the Sherman Act, when extensive factual allegations were made to support plaintiffs' conspiracy allegations – which the Second Circuit concluded were sufficient to make an inference of conspiracy from the pleaded facts "plausible" – including but not limited to: (i) allegations of the defendants' "very apparent non-competition policy in each others' markets"; (ii) allegations of the conventional "plus factor" that defendants' non-competition with one another would have been contrary to their self-interests in the absence of a conspiracy, which the Second Circuit concluded "makes it particularly difficult to conclude that the allegations contained in the complaint are insufficient to state a claim"; and (iii) allegations of statements made to Congress by defendants that are inconsistent with their claimed competitive reasons for not competing in one anothers' markets.

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PRELIMINARY STATEMENT

Petitioners' attack on the decision below, like the analyses offered by their amici, rests on a "straw man" argument that fundamentally mischaracterizes the Second Circuit's opinion. Petitioners and their amici claim that the court below held that only "innocuous parallel conduct" need be alleged, to survive a motion to dismiss an antitrust conspiracy claim under Rule 12 (b)(6). Petition ("Pet.") 1 ("The court held that a complaint can survive a motion to dismiss simply by alleging otherwise innocuous parallel conduct. . . ."). But the Second Circuit's opinion does *not* state that allegations of "parallel conduct" are necessarily (or "always", Pet. 2) sufficient. Instead, what the court held below was that allegations that an agreement in restraint of trade exists must be accompanied by "the factual predicate upon which those assertions are made" (Pet. App. 23a, 25a), and that the alleged factual predicate "does need to include conspiracy among the realm of plausible possibilities." Pet. App. 19a. "If a pleaded conspiracy is implausible on the basis of the facts as pleaded – if the allegations amount to no more than 'unlikely speculations' – the complaint will be dismissed." Pet. App. 20a. Thus, under the Second Circuit's clear formulation, *facts* must be pleaded which make an inference of conspiracy from those pleaded facts a "plausible" one.

For example, the Second Circuit has held in another recent decision that this requirement of "plausible" factual allegations to support a conspiracy allegation was *not* satisfied. *In re Tamoxifen Citrate Antitrust Litig.*, 429 F.3d 370, 402 (2d Cir. 2005)(affirming dismissal under Rule 12(b)(6) on grounds that "the pleaded conspiracy seems to us to be 'implausible.'"). As the holding in *Tamoxifen* exemplifies, the requirement of factual allegations that "plausibly" support an inference of conspiracy – which is the standard actually articulated by the Second Circuit below – is a significantly more demanding

one than Petitioners and their amici would have this Court believe.[1]

Contrary to Petitioners' argument, nothing in the decision below states that allegations of mere "parallel conduct" necessarily (or "always", Pet. 2) will satisfy that legal standard. Instead, the Second Circuit appropriately recognized that not all conduct that might be considered "parallel" has the same probative value, and that courts should look to "the *particular* parallelism asserted" to determine whether it supports a plausible inference of conspiracy. Pet. App. 25a (emphasis added). In this case, the most central conduct in question is defendants' "'very apparent non competition policy in each others' markets.'" Pet. App. 6a. This "particular parallelism" – a "very apparent policy" of non-competition with one another – is far more suggestive of conspiracy than various other forms of "parallel conduct" (such as mere parallel price changes or the like) might be. Petitioners and their amici attempt essentially to sidestep evaluation of these actual allegations, instead making a rigid and simplistic argument that *any* conduct that might be characterized as "parallel" in any sense is therefore *necessarily* insufficient to suggest conspiracy.

It is Petitioners' proposed legal standard – and not the standard adopted by the Second Circuit below – that would be unreasonable and contrary to established law. Petitioners argue that the governing *pleading standard* should be cloned directly from this court's *summary judgment* standards in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574

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1. For this reason, much of the argument by Petitioners' amici is simply misdirected. For example, the amici curiae economists direct their entire argument at a supposed "parallel behavior is enough" standard that would be much less demanding than the standard that the Second Circuit actually applied, even while expressly declining to "offer a view as to exactly how heavy an additional burden plaintiffs should bear." Brief of Amici Curiae Economists in Support of Petitioner, 2, 13. Like some of the other amicus briefs, the economists' brief never evaluates – indeed, it never even mentions – the Second Circuit's *actual* requirement that facts be alleged that give rise to a "plausible" inference of conspiracy.

(1986). Laying on unsupported "tort reform" rhetoric with a trowel, Petitioners argue principally that such a high standard is necessary in order to avoid "the colossal expense of undergoing discovery," Pet. 1, "mushrooming claims" and "incalculable costs," Pet. 3, and a supposed "avalanche of wasteful litigation." Pet. 11.[2] But arguments just like these have been rejected, recently and repeatedly, by this Court.

In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Court reversed the Second Circuit's holding that a summary judgment standard closely analogous to the *Monsanto/Matsushita* standard (*i.e.*, the employment discrimination standard of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)) should be applied on a motion to dismiss, concluding that it was an impermissible "heightened pleading" standard and was not provided for in Rule 9 (b). The Court in *Swierkiewicz* refused even to consider an argument ("whatever" its "practical merits"), that application of conventional pleading standards would "burden the courts and encourage disgruntled employees to bring unsubstantiated suits." *Id.* at 514-15. Likewise, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166-69 (1993), the Court refused to consider policy arguments that ordinary pleading standards "would subject municipalities to expensive and time-consuming discovery in every § 1983 case," stating that absent amendments to the Federal Rules of Civil Procedure, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." To no less a degree here than in *Swierkiewicz* and *Leatherman*, Petitioners' core argument, based entirely on the costs of

2. In the briefing below we challenged Petitioners to identify "any respectable study or judicial authority that could support an assertion that antitrust cases are generally lacking in merit or tend to settle for small 'harrassment value' sums," as Petitioners and their amici continue to suggest. But no such study or judicial authority has been cited, because none exists. Instead, Petitioners and their tort reform-oriented amici continue to rely on anecdotal references and assertions about *other* bodies of case law such as securities cases, where statutory measures were taken a decade ago to cure any perceived problems, as the Second Circuit points out in its opinion. Pet. App. 30a n. 13.

pretrial litigation, "wrongly equates freedom from liability with immunity from suit." *Leatherman*, 507 U.S. at 166. Indeed, other than the District Court in this case, *all* courts that have considered this issue since *Swierkiewicz*, in antitrust conspiracy cases like this one, have uniformly concluded that the principles articulated in *Swierkiewicz* and *Leatherman* foreclose the same "plus factors" argument that Petitioners make here in the context of antitrust conspiracy cases. *See* Pet. App. 26a n.9 (citing and discussing four recent antitrust cases applying *Swierkiewicz*).

Petitioners strain to portray the Second Circuit's opinion as though it invited this Court's intervention, in stating that if the balance struck by the Federal Rules of Civil Procedure is "to be re-calibrated . . ., it is Congress or the Supreme Court that must do so." Pet. App. 30a; *cf.*, Pet. 3 ("The Court should accept the Second Circuit's invitation."). However, the Second Circuit was merely observing that its decision is effectively mandated by the Federal Rules of Civil Procedure, which were promulgated under this Court's authority. To be sure, if this Court or Congress were to change those rules, they hypothetically could effectuate a radical change in the law of the type that Petitioners seek. However, this Court already has made crystal clear that it will *not* change the governing rules on an *ad hoc* basis in particular cases like this one. *See Swierkiewicz*, 534 U.S. at 515 ("A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'") (quoting from *Leatherman*, 507 U.S. at 168). Thus, Petitioners' entire argument flies in the face of principles unambiguously embraced by this Court.

The "plausibility" standard articulated by the Second Circuit below is an eminently reasonable one, and is in harmony with the Federal Rules of Civil Procedure. It does not, as Petitioners erroneously argue, permit a complaint to survive if it merely alleges "innocuous parallel conduct" coupled with a mere "conclusion" of "conspiracy." Instead, it is flexible enough to take into account – in addition to a requirement that facts and not only conclusions be alleged –

the fact that if direct evidence of conspiracy is uncovered in discovery, inferential proof of conspiracy based on "plus factors" is then unnecessary. *Cf.*, *Swierkiewicz*, 534 U.S. at 511 (to apply the *McDonnell Douglas* summary judgment standard on a motion to dismiss would be "incongruous" since "if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all of the elements of a prima facie case" under *McDonnell Douglas*). In addition, in conspiracy cases like this one where "plus factors" have in fact been alleged – as explained in greater detail below – it permits such allegations to be evaluated generously and flexibly, rather than in the more rigid fashion that might be appropriate in the context of specific evidence on a motion for summary judgment. *See Id.* at 512. ("Given that the [*McDonnell Douglas*] prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.").

If any area of law were an appropriate one in which to deviate from the principles laid down in *Swierkiewicz* and *Leatherman*, it would *not* be antitrust law, in view of the vital importance of antitrust law,[3] and of private litigation to its adequate enforcement.[4] Thus, in refusing to make an exception from *Swierkiewicz* for antitrust cases, the court below rightly emphasized that the antitrust enforcement regime "contemplates the enforcement of antitrust laws in large measure by private litigants." Pet. App. 29a. As recognized in *Radovich v. Nat'l Football League*, 352 U.S. 445, 454 (1957), "[i]n the face of such a policy this Court should not add

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3. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).

4. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (private actions "provide a significant supplement to the limited resources available to [DOJ] for enforcing the antitrust laws and deterring violations"); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262, 266 (1972) (In the antitrust laws "Congress encouraged [private litigants] to serve as 'private attorneys general.').

requirements to burden the private litigant beyond what is specifically set forth by Congress in those [antitrust] laws."

Moreover, this Court's precedents recognize that summary disposition is uniquely problematic "in complex antitrust litigation where motive and intent play leading roles, *the proof is largely in the hands of the alleged conspirators*, and hostile witnesses thicken the plot." *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)(emphasis added). *Accord, Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976) ("[I]n antitrust cases, *where 'the proof is largely in the hands of the alleged conspirators,'* . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.") (emphasis added, quoting from *Poller*). Those established antitrust pleading principles are incompatible with Petitioners' argument that in order even to survive a motion to dismiss, a plaintiff pleading an antitrust conspiracy must already have in its possession, and must plead, specific details of the "who, what, when and where" of the alleged conspiracy. Pet. 2. Such a requirement also would conflict with the holding in *United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954), that in antitrust cases "where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified."

For these reasons, and others articulated below, the arguments advanced by Petitioners are clearly foreclosed by numerous precedents in this Court. Petitioners' arguments that the decision below is in conflict with other Circuits, and with the Court's recent decision in *Dura Pharms, Inc. v. Broudo*, 125 S. Ct. 1627 (2005), are baseless. The petition for certiorari should therefore be denied.

REASONS FOR DENYING THE PETITION

I. The Decision Below Is Consistent With This Court's Precedents On Pleading Standards Under The Federal Rules.

There are no heightened pleading requirements for antitrust cases. In *Swierkiewicz* this Court most recently reiterated that all that is required is a "short and plain statement" of the claim, pursuant to Fed. R. Civ. P. 8(a)(2). 534 U.S. at 508. *Swierkiewicz* states outright that it makes no sense to require a plaintiff to allege all elements of a "*prima facie* case" of employment discrimination, because if direct evidence of discrimination were to emerge in discovery such an inferential case would be unnecessary at trial, and it would be "incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered." 534 U.S. at 511-12. In precisely the same way in this case, one need not specifically allege "plus factors" that would permit an inference of conspiracy from parallel conduct, since if direct evidence of conspiracy emerges in discovery, an inferential case based on "plus factors" will be entirely unnecessary. Defendants' argument that "plus factors" were required to be alleged in excruciating detail attempts to resurrect "heightened pleading" standards, precisely analogous to those adopted by the Second Circuit prior to its reversal in *Swierkiewicz*, which this Court in *Swierkiewicz* resoundingly rejected.

Petitioners argue that "unlike the complaint in *Swierkiewicz* – which alleged the who, what, where, when and why facts underlying a straightforward legal claim – the complaint here contains a bare allegation of conspiracy. . . ." Pet. 16. Not only is Respondents' cramped construction of *Swierkiewicz* at odds with clear authority in the circuit courts, but it cannot be squared with *Swierkiewicz* itself, for at least two elementary reasons.

First, the allegation in *Swierkiewicz* was essentially that the plaintiff was fired because he was Hungarian. In

comparison to Plaintiffs' allegations here, the plaintiff in *Swierkiewicz* pled much *less* to establish the discriminatory motive that they alleged. *See* 534 U.S. at 510 (District Court in *Swierkiewicz* stated that plaintiff did *not* allege "'circumstances that support an inference of discrimination'"; Second Circuit stated that allegations did *not* "'raise an inference of discrimination'"; and this Court's opinion assumed correctness of those views). Petitioners' distinction of *Swierkiewicz* on the basis that "[u]nlike discrimination based on national origin, parallel conduct is not unlawful" (Pet. 16) is specious, because evidence sufficient to infer unlawfulness was not alleged in *Swierkiewicz*, as all courts to consider the case agreed.

Second, the actual language and reasoning of *Swierkiewicz* – which Respondents studiously avoid – makes their interpretation of the case untenable. *Swierkiewicz* certainly does not reason, as Respondents would have it, that the plaintiff had made such detailed allegations of evidentiary fact that a circumstantial case at trial would be unnecessary. Respondents' proposed interpretation turns *Swierkiewicz* on its head, suggesting that it held that a *prima facie* case of discrimination need not be pleaded only if direct evidence of discrimination sufficient to prove the plaintiff's case *has been pleaded*. This is just the opposite of what *Swierkiewicz* says. Instead, the Court clearly held that the possibility that direct evidence of discrimination that had *not* been pleaded could be later "discovered" was enough to make the pleading of a *prima facie* case unnecessary. 534 U.S. at 511-12. *Swierkiewicz* unambiguously rejects Petitioners' entire premise that the appropriate purpose of a motion to dismiss is to avoid a "burden on the courts" or to deal with "unsubstantiated lawsuits," making clear – as had been earlier emphasized in *Leatherman* – that those functions are served instead by summary judgment after discovery. *Id.* at 514-15 ("[C]laims lacking in merit may be dealt with through summary judgment. . . . Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits"). That Respondents cannot support their position without such transparent distortions of *Swierkiewicz* merely dramatizes its stark conflict with their argument.

II. The Decision Below Is Consistent With All Case Law Interpreting *Swierkiewicz* And Does Not Conflict With Current Law In Any Circuit.

As the Second Circuit points out in its opinion, at least four antitrust conspiracy cases, decided since *Swierkiewicz* and similar in pertinent respects to this case, have specifically rejected the arguments that Petitioners make here, in reliance on this Court's decision in *Swierkiewicz*. Pet. App. 26a n.9 (citing and discussing cases). Similarly, amicus American Petroleum Institute concedes that the Third and Fifth Circuits have agreed with the Second Circuit's conclusion below. *See* Brief of The American Petroleum Institute as Amicus Curiae, at 11. More broadly, since *Swierkiewicz* virtually every Circuit Court of Appeals also has embraced the basic view – which is fatal to Petitioners' arguments – that "heightened pleading standards" of the type advocated by Petitioners cannot properly be judicially erected outside the narrow contexts in which particularity in pleading is specifically required under Rule 9(b).[5] All of that case law interprets *Swierkiewicz* uniformly

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5. *Educadores Puertorriquenos En Accion v. Hernandez*, 367 F.3d 61, 66 (1st Cir. 2004) ("overruling" prior decisions erecting heightened pleading standards and doing so "globally," while observing that in *Swierkiewicz* "the Court has signaled its disapproval of all heightened pleading standards except those that emanate from either congressional or Rule-based authority"); *In re Tower Air, Inc.*, 416 F.3d 229, 237-38 (3d Cir. 2005) ("a plaintiff will not be thrown out of court on a Rule 12(b) (6) motion for lack of detailed facts" and "[t]o hold otherwise would be effectively to transform Rule 12(b) (6) motions into multi-purpose summary judgment vehicles. That we will not do."); *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 347 (4th Cir. 2005) ("unmeritorious claims . . . are eliminated not by motions to dismiss, but rather primarily through 'liberal discovery rules and summary judgment motions'"); *GE Capital Corp. v. Posey*, 415 F.3d 391, 396-97 (5th Cir. 2005) ("[o]ther than in the situations expressly enumerated in rule 9(b), e.g. allegations of actual fraud, plaintiffs must satisfy only the minimal requirements of rule 8(a)."); *Thomson v. Washington*, 362 F.3d 969, 970-71 (7th Cir. 2004) ("Federal judges are forbidden to supplement the federal rules by requiring 'heightened' pleading of claims not listed in Rule 9(b)"); *Doe v. Cassel*, 403 F.3d 986, 989 (8th Cir. 2005) ("The only permissible heightened pleading requirements in civil suits are those contained in the Federal Rules of Civil Procedure or those in federal statutes enacted by

(Cont'd)

and correctly, in holding that "heightened pleading" requirements (such as Petitioners' proposed "plus factors pleading requirement") are impermissible.

In purported opposition to this solid wall of authority, Petitioners claim that there is a conflict between the Circuits in light of only three Circuit decisions (two of which preceded *Swierkiewicz*) — *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989), *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53 (1st Cir. 1999) and *NHL Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005). Petitioners' many amici identify no other Circuit Court opinions with which the Second Circuit's opinion could be said to conflict, instead simply recycling Petitioners' reliance on *Cayman*, *DM Research* and *NHL*. But no genuine conflict exists with any of these decisions.

Not only was *Cayman* decided long before either *Leatherman* or *Swierkiewicz*, but in *Cayman*, the complaint contained only the following nearly incoherent, one-sentence conspiracy allegation in the context of unrelated RICO and breach of contract claims:

> Within the industry, there is a common knowledge that concerted action is contemplated and invited for all transmission companies to uniformly breach contracts with producers with an object and purpose of forcing producers to accept lower prices for natural gas; United has adhered to and participated in this price fixing conspiracy which is illegal *per se* under Section 1 of the Sherman Act.

(Cont'd)

Congress."); *Empress LLC v. City & County of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005) ("the logical conclusion of [*Swierkiewicz*] dictates that a heightened pleading standard should only be applied when the Federal Rules of Civil Procedure so require."); *Andrx v. Pharm., Inc. v. Elan Corp.*, 421 F.3d 1227, 1234-35 (11th Cir. 2005) ("While courts had previously applied a heightened pleading requirement in antitrust cases, this view has subsequently been rejected in favor of applying Rule 8(a)'s notice pleading standard.").

873 F.2d at 1361. Because the claims in *Cayman* centered around an alleged mere breach of contract, the court took a skeptical approach to this incomprehensible conspiracy allegation, which clearly would not have survived the "plausibility" standard articulated by the Second Circuit below. Without citing *Matsushita* – or even beginning to grapple with any of the profound questions that would be raised by its application on a motion to dismiss – the court in *Cayman Exploration* merely observed that the plaintiff had "failed to allege *any* facts which would support an inference that the alleged actions by gas transmission companies would be contrary to their economic interests absent an agreement." *Id.* (emphasis in original). The *Cayman* court's emphasis on the word "any" strongly suggests that had "any" facts supporting an inference of conspiracy been alleged there (as many plainly have been here), the court's ruling would have been entirely different.

Petitioners' treatment of *DM Research* is disturbing because the Second Circuit's opinion painstakingly harmonizes it with its own ruling – going so far as to borrow both its "plausible" phraseology and its "unlikely speculations" language in part from the *DM Research* opinion (Pet. App. 20a, 22a n.6) – yet Petitioners ignore everything that the Second Circuit pointed out about *DM Research*. Pet. 20. Far from conflicting with the decision below, *DM Research* is one of the guiding lights that the Second Circuit thoughtfully followed in phrasing its own opinion. Moreover, even if there were anything in *DM Research* that failed to take *Swierkiewicz* fully into account, that would be only because *DM Research* preceded *Swierkiewicz* by three years. In the wake of *Swierkiewicz*, in *Educadores*, the First Circuit "globally" overruled any of its precedents that might be construed to erect heightened pleading standards not provided for in Rule 9(b), recognizing that such precedents are no longer reconcilable with the "handwriting on the wall" in *Swierkiewicz*. 367 F.3d at 66. *See* n.5, *supra*. Thus, even if something in *DM Research* were arguably at odds with the decision below – although nothing truly is – it would be effectively abrogated by the First Circuit in *Educadores*. Especially after *Educadores*, to profess the existence of a

continuing "circuit conflict" based on *DM Research* is indefensible.

To profess a "circuit conflict" based on *NHL* is preposterous. The *NHL* decision does nothing to support Petitioners' contentions, but affirmatively undermines them. In *NHL*, the Sixth Circuit "conclude[d] that the district court erred in determining that Plaintiffs had failed to allege facts sufficient to support the existence of an agreement between the OHL and the NHL." 419 F.3d at 475-76. The court reached that conclusion based on allegations that the challenged conduct would have been "contrary to their economic self-interest if taken separately" (*id.*) – precisely the sort of allegations made in great detail here. *See* Pet. App. 32a-33a n.15. The Sixth Circuit explicitly rejected an effort to argue (contrary to the plaintiffs' allegations) that such conduct was not in fact contrary to the defendants' independent self-interests, on the basis that "at this stage of the litigation, the Court is required to make all reasonable inferences in favor of Plaintiffs." 419 F.3d at 475-76. The basis on which dismissal of the claims was affirmed in *NHL* is utterly inapposite here, stemming from the court's conclusion that the injuries were caused by a collective bargaining agreement, and thus were subject to a non-statutory antitrust exemption having no conceivable bearing on this case. *Id.* at 474-76.

In short, the supposed "conflict" with other Circuits on which the petition for certiorari relies is nonexistent. In fact, the Second Circuit's decision rests squarely in the center of a consistent stream of case law after *Swierkiewicz*.

III. The Decision Below Does Not Conflict With This Court's Decision In *Dura*.

Lacking any reasonable basis in a circuit conflict for certiorari, Petitioners strain to argue that the decision below conflicts with *Dura*. Pet. 16-17. However, Defendants' contention that *Dura* is germane here is outlandish, both legally and factually.

From a legal standpoint, *Dura* was a securities case governed by the Private Securities Litigation Reform Act

("PSLRA"), which erected a special "heightened pleading" standard for securities cases for which antitrust has no counterpart. The first sentence of *Dura* cites to the heightened "causation" pleading requirement of the PSLRA, 15 U.S.C. § 78u-4(b)(4), and the opinion cites that provision as showing that "Congress has imposed statutory requirements on that private action." 125 S. Ct. at 1631. The opinion points out that "[t]he statutory provision at issue here and the paragraphs that precede it emphasize" a heightened pleading objective, stating that the "causation" section of the PSLRA "expressly imposes on plaintiffs 'the burden of proving' that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover.'" *Id.* at 1633. Only based on such heightened statutory PSLRA requirements does the Court conclude that "*[t]he statute thereby makes clear* Congress' intent to permit private securities fraud actions for recovery where, but only where, plaintiffs adequately allege and prove the traditional elements of causation and loss." *Id.* (emphasis added).

Equally importantly, from a factual standpoint, *Dura* involved the purchase of an asset for investment and resale in the hope of profit at a later date. Its entire factual rationale — concerning the inescapable effect of the second transaction on the existence of any loss to support a claim in the first instance — has no conceivable application to a case like this one, which involves the purchase of services at an inflated price for consumption only, and no possibility of subsequent recoupment of losses through resale. The causation issues that were the entire factual point of *Dura* are completely inapposite, and have no relevance at all to this case.

IV. The Summary Judgment Standards In *Matsushita* Do Not And Should Not Apply To A Motion To Dismiss Under Rule 12(b)(6).

Petitioners also contend that the Second Circuit's decision below conflicts with *Matsushita*. *See* Pet. 14 (arguing that *Matsushita* applies because "the legal standard under which the court evaluates the allegations for legal sufficiency is the same legal standard that the court applies at summary

judgment.") and 21 (contending that the standard to be applied on a motion to dismiss is "the *Monsanto/Matsushita* standard"). The development of summary judgment doctrine under *Matsushita* is the subject of antitrust and procedural literature too voluminous to be fully explicated in this brief. An important recent summary of the doctrine and related developments in jurisprudence – which presents that history in a context that is directly relevant – can be found in Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1029-1034 (June 2003). As shown below, the summary judgment doctrines embodied in this Court's *Matsushita* and *Monsanto* decisions cannot appropriately be applied in the context of a motion to dismiss for at least three basic reasons, in addition to those expressed in *Swierkiewicz* and addressed above.

A. To apply *Matsushita* on a motion to dismiss would violate multiple established pleading standards.

As Professor Miller's article points out, even in the context of summary judgment the *Matsushita* decision provoked strong dissent, in part on the basis that even on summary judgment after full discovery – and even when fully developed expert economic testimony was before the court – the *Matsushita* standard risks invasion of the fact-finding prerogatives of the jury. *Id.* at 1034, 1045-46. Nevertheless, the *Matsushita* standard has become an accepted element of *summary judgment* jurisprudence. But the radical leap urged by Petitioners – to apply that same *Matsushita* analysis to the face of the complaint in the context of a motion to dismiss – is completely unprecedented at the appellate level. To condone that unprecedented leap would be to sanction an extreme example of the "rush to judgment" criticized by Professor Miller in his recent article, in which he states that any trend toward applying *Matsushita* summary judgment standards on a motion to dismiss "not only would be unfortunate, but *would be completely inconsistent with the philosophy and principles of the Federal Rules in general and the pleading rules in particular.*"

Miller, 78 N.Y.U.L. Rev. at 1073-74 (emphasis added). More specifically, it would conflict with the bedrock requirements on a Rule 12(b)(6) motion: (i) to treat Plaintiffs' factual allegations as true,[6] *see Leatherman*, 507 U.S. at 164; (ii) to draw all permissible inferences in the non-moving party's favor;[7]

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6. For example, the District Court labeled certain of Plaintiffs' factual allegations as "assumptions," even though they are really straightforward allegations of fact. *See, e.g.*, Pet. App. 51a-53a (repeatedly characterizing explicit factual allegations by Plaintiffs about the functioning the relevant marketplace as "assumptions" rather than facts (Pet. App. 51a-52a), and then proceeding to reject them on the basis that they are "undermined" by other considerations having scant support (*id.*), from which the District court then derived "implications" directly at odds with Plaintiffs' factual allegations (Pet. App. 52a-53a)). The Complaint specifically alleges – citing and quoting supporting industry commentary – that the ILEC in an adjacent territory is "best situated" to compete in its neighbors' service areas. Cplt. ¶ 38. In the same vein, it alleges as to "surrounded territories" – which are illustrated by color illustrations attached to the complaint – that "the service of such surrounded territories presents the RBOC serving surrounding territories with an especially attractive business opportunity" and that in competing as a CLEC in such neighboring territories, an ILEC acting as a CLEC would have "substantial competitive advantages." Cplt. ¶¶ 40-41. The District Court swept away all of these factual allegations with a string of *ipse dixits*, asserting *as the indispensable cornerstone of its analysis* that "ILECs who attempt to become CLECs in another ILEC's territory have little competitive advantage over other CLECs" (Pet. App. 52a), that "an ILEC acting as a CLEC is in substantially the same position, and must undertake the same economic calculus, as any other CLEC" (Pet. App. 53a), and that "the ILEC-as-CLEC is not different from any other CLEC with respect to its entry into new markets." Pet. App. 54a. Not only were these central assertions of the District Court's opinion contrary to direct factual allegations in the complaint - as well as being dubious at best as a matter of common sense – but the District Court cited no evidence or authority to support them.

7. Since the gist of *Matsushita* is that a plaintiff on summary judgment must offer evidence that "tends to exclude the possibility" of independent conduct (475 U.S. at 588) – *i.e.*, that the defendant receives the benefit of ambiguous inferences on such a motion – to apply *Matsushita* standards on a motion to dismiss diametrically reverses the established rule that the plaintiff gets the benefit of such inferences on a motion to dismiss. Indeed, this precise point of conflict with conventional pleading standards is one of the bases for the Eleventh Circuit's refusal to accept an argument that

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and (iii) to entertain dismissal under Rule 12(b)(6) only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).[8]

B. To apply *Matsushita* on a motion to dismiss would impose unrealistic burdens on jurists.

Even apart from the inevitable deviations from bedrock pleading principles that it would spawn, application of a *Matsushita* style "plus factors pleading requirement" on a motion to dismiss also would be imprudent for other practical reasons. The tempering effects at the summary judgment stage of expert testimony and of the availability of a defendant's own internal business analyses – which provide an indispensable "reality check" on a court's sense of what is persuasive in the context of a motion for summary judgment – are entirely absent on a motion to dismiss under Rule 12(b)(6). The District Court quite appropriately expressed at argument that to make such judgments "makes me uncomfortable at the pleading stage" (JA-749) and that the Court would be "much better off after I hear the parties' hired economists making the same arguments you are making now, but with charts and graphs." The District Court further expressed concern that if such an analysis were required "[H]ow do I get there?" (JA-765) and asked whether plaintiffs should be required to annex to these complaints "some study or something saying why" the facts alleged are suspicious. The District Court further articulated the dizzying quandaries that a "plus factor pleading requirement" would impose upon trial courts:

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challenged behavior was not in fact contrary to the defendants' independent self-interests, as the plaintiffs had alleged that it was, in the *NHL* case, upon which Petitioners and their amici inexplicably rely. 419 F.3d at 475-76. *See* p. 12, *supra*.

8. Petitioners are relatively direct in their attack on this longstanding mandate of *Conley*, italicizing "no set of facts" and arguing that this principle in particular should not govern in antitrust cases. Pet. 2-3.

> [T]he real question is, is the failure to go into another area contrary to the expected economic interest of the defendants such that a reasonable inference would arise that it's strange that they don't and there must therefore be an agreement. That looks awfully like a question of fact. It is an empirical kind of question about how the business works, and I am left wondering what am I to rely on and how am I to analyze these various questions of what it really would take to move into the next door area. Do I read a book on telecommunications? Do I listen to the representations of counsel? Do people need to submit expert reports? Should the pleading contain some kind of expert analysis that explains why this is suspicious?

JA-793. As these comments by the District Court below dramatically illustrated, to extend *Matsushita* analysis to a motion to dismiss would effectively require plaintiffs to engage in complex economic debate and expert analysis in the texts of their complaints, and would require trial courts to engage in solipsistic economics debates with themselves in chambers with only the face of a complaint and their own imagination to guide them — flying directly in the face of this Court's explicit holding, in *Swierkiewicz*, that courts are not to confuse pleading standards with evidentiary requirements.

C. To apply *Matsushita* on a motion to dismiss would unbalance risks of error.

Another way in which application of *Matsushita* to motions to dismiss would be ill-advised stems from the fact that the balance that *Matsushita* strikes is calibrated to an entirely different context, in which the risks from "false positives" are vastly greater than on a motion to dismiss. *See Matsushita*, 475 U.S. at 594 (mistaken inferences of liability "must be balanced against the desire that illegal conspiracies be identified and punished"). As the Court made clear in *Matsushita*, the balance that it strikes between contrasting risks of error is calibrated entirely to the risk of imposing improper

liability for treble damages as a result of possible error by a jury at trial.

By contrast, the much less earthshaking interest at stake on a motion to dismiss is merely whether a claim warrants discovery. In antitrust treble damage actions, mere discovery costs and attorneys' fees pale in comparison to the practical and policy importance of arriving at the right answer as to unlawfulness in the end, and duly taking into account the risk of "false negatives" as to ultimate liability in light of "the desire that illegal conspiracies be identified and punished." *Matsushita*, 475 U.S. at 594. This concern is a particularly serious one in the antitrust context since, as the Second Circuit points out in its opinion, the Sherman Act "contemplates the enforcement of antitrust laws in large measure by private litigants." Pet. App. 29a. *See* n. 4, *supra*.

In process terms, the District Court's application of *Matsushita* standards on a motion to dismiss would equate mere discovery costs and attorneys' fees – which can be managed by a court in other ways in any event through limitations on the discovery process – with the risk that erroneous but massive jury awards of treble damages could "chill" defendants' pro-competitive conduct. To equate such vastly different burdens is to be unreasoningly carried away by today's rhetoric about the "litigation explosion" and "liability crisis."[9] As this Court put it in *Leatherman*, such conflation of mere discovery burdens with the risks of erroneous *liability determinations*, on which summary judgment standards are based, "wrongly equates freedom from liability with immunity from suit." 507 U.S. at 166. By arguing that the *Monsanto* and *Matsushita* standards governing protection against liability through summary judgment should be abruptly transposed into Rule 12 (b)(6) pleading standards, Petitioners attempt to lead this Court into that same basic error.

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9. *See* Miller, 78 N.Y.U.L. Rev. at 1133 ("It is [*Matsushita's*] improper extension and the lack of any reasoned law-fact analysis by lower federal courts . . . that appear to pose the danger. Unfortunately, today's rhetoric about the 'litigation explosion' [and] a 'liability crisis' . . . may be encouraging district courts and courts of appeals to rely on [*Matsushita*] to justify resorting to pretrial disposition too readily. . . . ").

V. Petitioners Mischaracterize Plaintiffs' Allegations To Erect A "Straw Man" Argument That Only "Innocuous Parallel Conduct" Is Alleged.

Supreme Court Rule 15 admonishes counsel to identify early "any perceived misstatement made in the petition." Petitioners sweepingly mischaracterize the allegations of Plaintiffs' complaint, by claiming that they include only allegations of "innocuous parallel conduct" coupled with a "bare assertion" of conspiracy. As shown below, and as the Second Circuit concluded in its opinion, Plaintiffs' complaint alleges far more.

A. Background

This case concerns the basic structure and functioning of the market for local telephone service in the United States. Prior to the Telecommunications Act of 1996, 110 Stat. 56 (1996), (the "1996 Act"), local telephone service was considered to be the classic "natural monopoly," subject to traditional rate-regulation rather than to competition. As prefatory sections of the 1996 Act make clear, its core purpose was to "provide for an orderly transition from regulated markets to competitive and deregulated telecommunications markets" and to open "all telecommunications markets to competition." To achieve these goals, the 1996 Act required Incumbent Local Exchange Carriers ("ILECs") to permit Competitive Local Exchange Carriers ("CLECs") – including ILECs operating as CLECs – to interconnect with the facilities and equipment of the ILECs at reasonable and nondiscriminatory "wholesale" rates. The realistic expectation was that competition, including but not limited to competition by the ILECs against one another as CLECs, would come to *replace* classic rate-regulation as the primary means for protecting against unnecessarily high prices.

Things have not unfolded as expected. As one Congressman stated in 2002:

> [T]he 1996 Act requires the Bell Companies to allow [CLECs] access to their lines. . . . The Bells frequently refuse to comply with these requests in

> a timely manner. Since 1996, Bell Companies have paid over $2 billion in fines. They clearly believe it is to their advantage to pay penalties for violations of the 1996 Act rather than open up their markets.

JA-387.[10] Likewise, Congressman John Conyers stated in 2001:

> Believing in the promise of the 1996 Act, . . . [CLECs] invested tens of billions of dollars, created 100,000 jobs, and began the enormously difficult work of providing choice. . . . But today, most of those companies have been devastated by the anti-competitive behavior and procrastination of the Bell monopolies. Tens of thousands of newly created jobs disappeared, billions of dollars of value are gone, many CLECs are bankrupt. . . . Instead of seeing the RBOCs eager to enter each others' businesses, there has been a general reluctance to compete.

JA-394. Similarly, Kevin Mooney, CEO of Cincinnati Bell and an ILEC insider, has been quoted as follows in an interview:

> I also feel [the ILECs] don't want to start a cross-border war. If ILEC A buys long-haul company B, then ILEC B is going to have to go after that. I think they feel that they have won the battle. They have beaten back the [CLECs]. . . . Why would they want to start a cross-border battle?

JA-400.

These types of observations have led to several antitrust claims in recent years by CLECs against ILECs under Section 2 of the Sherman Act, alleging unilateral monopolistic conduct. Prior to late 2002, however, there do not appear to have been cases brought against the ILECs alleging horizontal conspiracy

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10. Citations to evidence contained in the Joint Appendix below are given herein as "JA-___." The District Court considered the full contents of documents referenced in the Complaint, so that more than just the complaint's allegations was considered.

among them pursuant to Section 1 of the Sherman Act.[11] In late 2002, however, a senior executive of Qwest made public comments that astute observers took as evidence that the ILEC's parallel conduct likely are *not* the product of unilateral decisions by each ILEC, but instead the result of a horizontal conspiracy. Cplt. ¶44. Thereafter, based not only upon this event but on other facts as well, Congressman Conyers – who is the top Democrat on both the House Judiciary Committee and the House committee that oversees telecommunications issues – formally wrote (along with Congressman Lofgren) to Attorney General John Ashcroft on Dec. 18, 2002, demanding that an investigation be commenced by the Department of Justice ("DOJ") into the same apparent horizontal conspiracy alleged in this action, described below. This action was brought in response to the emergence of these and other strong grounds for believing a horizontal conspiracy may exist among the Defendants, to vindicate vitally affected public interests.

B. Nature of the Case

In this case, Plaintiffs allege that Defendants have agreed and conspired, in a *per se* violation of Section 1 of the Sherman Act, to allocate geographic markets to one another, to refrain from out-of-region local competition, and to exclude competitors from in-region local telephone service markets. Two elements of the alleged conspiracy can be separately viewed for didactic purposes, but mutually reinforce one another. *First*, Defendants are alleged to have agreed not to compete as CLECs in one another's ILEC territories. *Second*, Defendants are alleged to have agreed to engage in specific, parallel patterns of behavior in each of their ILEC territories, calculated to prevent CLECs other than Defendants from succeeding in competing with the ILECs as CLECs. Although the two elements of the alleged conspiracy are most readily

11. Nothing in the Supreme Court's recent decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*, 124 S. Ct. 872 (2004) ("*Trinko*"), undermines the *per se* liability that would follow under Section 1 of the Sherman Act if the Defendants are proven to have engaged in a horizontal conspiracy to allocate geographic markets to one another, as alleged in this case.

understood when presented as separate elements, they are alleged in the Complaint as parts of a single, interrelated conspiracy and pattern of joint conduct.[12]

C. Many Specifically Alleged Facts Suggest Conspiracy.

Certain aspects of the depicted territorial configurations of ILEC territories are important to an understanding of the reasons for the Second Circuit's decision below, which were mapped in detail in exhibits to the complaint in this case ("Cplt."). In particular, in part because Defendant Verizon acquired geographically dispersed assets that had been owned not by AT&T but by its historical competitors, Verizon has a great many small territories in which it is the ILEC which are, in many instances, completely surrounded by territories in which another Defendant is the ILEC. ILECs who are advertising and marketing in the geographic territory surrounding such "islands" of local service obviously would have a significant advantage in competing within such territories as a CLEC - stemming, *inter alia*, from such considerations as the exposure of customers within such surrounded territories to television and newspaper advertising for which the surrounding ILEC is paying in any event in order to maintain its market position in the surrounding territory. Informed industry commentary, which is quoted in the complaint, plainly states that such *neighboring* ILECs "are best situated to" compete as CLECs (Cplt. ¶ 38) and the Complaint resoundingly pleads as fact that "the service of such surrounded territories presents the [ILEC] serving surrounding territories with an especially attractive business opportunity" (Cplt. ¶ 40), which the Complaint particularizes as to each Defendant. Cplt. ¶ 41.

The Complaint alleges – citing supporting observations by informed observers – that despite these especially attractive business opportunities, the Defendant ILECs oddly

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12. *See Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (admonishing against "tightly compartmentalizing the various factual components [of an alleged conspiracy] and wiping the slate clean after scrutiny of each.").

have not sought to compete with one another as CLECs, even in these wholly surrounded and especially attractive territories – *i.e.*, that they have not pursued their individual competitive interests. This refusal of the ILECs to compete with one another is anomalous for numerous reasons, including that: (i) it does not square with Defendants' own complaints to Congress that the rates that a CLEC is required to pay an ILEC to lease its network components are below-cost and unfair (Cplt. ¶ 39; *see also* Pet. App. 5a-6a); (ii) it is contrary to the explicitly pleaded expectations of Congress when the Telecommunications Act was passed (Cplt. ¶ 38); (iii) it is contrary to "public pledges" given by Petitioners, at the time of the 1996 act, "that they would seek to advance the goals of competition by entering local telecommunications markets outside their region" (JA-376); and (iv) it is contrary to the demonstrated investment expectations of sophisticated CLEC investors, who invested "tens of billions of dollars" in the belief that competition as a CLEC was a potentially viable business model in the wake of the Telecommunications Act. In light of so many compelling facts, and treating the Complaint's reasonable allegations as true, the District Court was right to accept for pleading purposes the allegation that Defendants' stark and "very apparent non-competition policy in each others' markets" (Cplt. ¶ 45) is *not* the result of pursuit by Defendants of what would have been their individual, competitive financial interests in the absence of a conspiracy.

At the very minimum it is *plausible* to attribute this odd phenomenon to unlawful conspiracy among the Defendants, and the Complaint unambiguously does so. The plausibility of the Complaint's factual allegation that Defendants' policy of non-competition with one another is attributable to conspiracy finds support even in the actions of members of Congress, who would not lightly have written to the Attorney General to demand an investigation into the existence of collusion, as is specifically alleged in the Complaint. Cplt. ¶ 45. Moreover, the proposition that there is a disconnect between individual profit motives and the actuating springs of Defendants' relevant conduct finds telling support in the specifically pleaded public statement of Mr. Notebaert, an

executive office of one of the Defendants, that competition by an ILEC as a CLEC in another ILEC's territory *"might be a good way to turn a quick dollar* but that doesn't make it *right*." Cplt. ¶ 42 (emphasis supplied). Unsurprisingly, knowledgeable industry commentators publicly took this statement, as specifically alleged in the Complaint, as "evidence of potential collusion," Cplt. ¶ 44, and the Complaint pleads it as such.

Various other facts about the local telephone industry also are specifically pleaded, which "make a market allocation agreement feasible" in the specific market at hand, making it unusually practical to avoid detection of a conspiracy (Cplt. ¶ 48) and making any one competitor's noncompliance with the alleged conspiratorial agreement likely to be detected immediately by others and thereby making "a territorial allocation agreement among the Defendants more feasible, more readily enforceable, and more probable." Cplt. ¶ 49. Ample opportunity to conspire also has been specifically alleged by reason of the fact that the Defendants already are communicating with one another frequently regarding issues of common interest and concern through a "myriad of organizations." Cplt. ¶ 46. All of those factual allegations lend still further support to the Second Circuit's conclusion that an inference of conspiracy from the pleaded facts is a "plausible" one.

In short, the nature of the industry in question is such, in important ways that are pleaded in detail in the Complaint, that an inference of conspiracy is much more reasonable and natural than it might be in some other industries, in which market allocation would be either easier to detect from the standpoint of outside authorities or more difficult to enforce from the standpoint of its participants. In many cases, including this Court's decision in *Matsushita* itself, great significance has been attached to such facts. *See Matsushita*, 475 U.S. at 589-93. Plaintiffs also specifically allege that conspiracy among the Defendants *facilitated attainment* of their respective objectives of excluding CLECs, which has been sufficient to show the "plus factor" of "common motive" at

least since *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

The Complaint in this case does far more than make a "bare bones" assertion of conspiracy – as Petitioners inaccurately assert – but fully identifies "the relevant product market, the co-conspirators, and describe the nature and effects of the alleged conspiracy." *Granite Partners, L.P. v. Bear, Stearns & Co.*, 58 F. Supp. 2d 228, 238 (S.D.N.Y. 1999). Indeed, Plaintiffs' allegations closely parallel facts that survived even *a motion for summary judgment*, in Judge Posner's decision in *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002). In that case the industry structure supported an inference of potential conspiracy even on summary judgment because "[t]he five original defendants . . . accounted during the period of the alleged conspiracy for 90 percent" of the market, *id.* at 656, while in this case, the four defendants are specifically alleged to have *more than* 90 percent of the market in the lower 48 states. Cplt. ¶ 48. In *High Fructose*, this made a conspiracy easy to police because "elaborate communications . . . would not have been necessary", 295 F.3d at 656; and the same is alleged in closely matching detail here. Cplt. ¶ 48-49. And perhaps most importantly in *High Fructose*, heavy weight was attached by Judge Posner to the fact that "there is evidence that the defendants were not competing," 295 F.3d at 661, and the same is resoundingly alleged here. Cplt. ¶¶ 39-40, 42, 45.

Even if summary judgment standards were applicable – as outlandish as that would be under this Court's precedents in *Swierkiewiecz* and *Leatherman* – this complaint still would pass muster in light of the extensive allegations made in the complaint. In cases of parallel conduct, Petitioners argue that a plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently – *i.e.*, so-called "plus factors." Pet. 12-13. But the complaint in this case alleges precisely such "plus factors", specifically alleging – with the help of detailed illustrations – that Defendants' failure to compete "would be anomalous in the absence of an agreement among the RBOCs not to compete with one another" (Cplt. ¶¶ 40-41), and that "Defendants had

compelling common motivations to include in their unlawful horizontal agreement an agreement that each of them would engage in a course of concerted conduct calculated to prevent effective competition." Cplt. ¶ 50.

Plaintiffs have clearly alleged the widely recognized "plus factor" that Defendants' activities would have been against their own individual business interests absent an illicit agreement. *Apex Oil Co. v. Di Mauro*, 822 F.2d 246, 257 (2d Cir. 1987); *In re Nasdaq Market-Makers Antitrust Litig.*, 894 F. Supp. 703, 713-14 (S.D.N.Y. 1995). Richard Notebaert of Qwest has made public statements that "[e]ven though his company could use a new revenue stream . . . he would not consider competing against his old firm for phone customers in the Chicago area" and that "*it would be fundamentally wrong* to compete for Ameritech's residential customers *even though Qwest could profit from the service.*" Jon Van, *Ameritech Customers Off Limits: Notebaert*, Chicago Tribune, Oct. 31, 2002 (emphasis added). If Plaintiffs are given the benefit of all reasonable inferences – as they must be on a motion to dismiss – Notebaert's statements, which are specifically quoted in Plaintiffs' complaint (Cplt. ¶ 42), clearly support a conclusion that Defendants were acting against their individual financial interests (absent a conspiracy) in staying out of one another's territories. Indeed, no less than the senior Democrat of the House committee that oversees telecommunications matters evidently perceived Notebaert's statements in just that way, inasmuch as it was one of the considerations that prompted him to request a formal investigation into the matter as alleged in the Complaint. Cplt. ¶ 45. It cannot seriously be maintained that such a formal reactions to Notebaert's statements – not only by Congressmen Conyers and Lofgren but by other knowledgeable observers as well (Cplt. ¶ 44) – was implausible as a matter of law on a motion to dismiss.

Furthermore, as shown below, each of the two main elements of Defendants' interrelated and unitary conspiracy has been alleged with far more than any required level of detail.

D. Plaintiffs have sufficiently alleged facts suggesting conspiracy to allocate markets and refrain from out-of-region local competition.

The Complaint provides a wealth of detail about the principal element of the alleged conspiracy which is far more than is necessary to describe its nature, participants, and effects. Not only does the Complaint allege that Defendants agreed to refrain from engaging in meaningful head-to-head competition in each other's markets, but it also identifies specific instances of market allocation and conduct contrary to the interests of individual Defendants in the absence of an agreement. Cplt. ¶¶ 37-41. The Complaint identifies and maps numerous geographic regions in which the configuration of Defendants' ILEC territories provides a surrounding ILEC with substantial advantages with which to compete as a CLEC, supporting a reasonable inference that the failure to compete in such territories is due to something (*i.e.*, conspiracy) other than pursuit of the surrounding ILEC's individual interest. Cplt. ¶¶ 40-41. Further, Plaintiffs allege that the four Defendants, who together account for at least ninety percent of the market for local telephone services within the 48 contiguous states, did not need frequent communications to allocate markets successfully. Cplt. ¶ 48. Instead, "[i]f one of the Defendants had broken ranks and commenced competition in another's territory, the others quickly would have discovered that fact." Cplt. ¶ 49. "The likely immediacy of such discovery makes a territorial allocation agreement among the Defendants more feasible, more readily enforceable, and more probable." *Id.* These are precisely the type of circumstantial considerations, for example, that Judge Posner relied upon in his denial of summary judgment in *High Fructose* (discussed above). To require more than this to be pleaded would be to require that plaintiffs prove their case conclusively and engage in extensive "law and economics" debate, or otherwise prove their case in the complaint. For nearly fifty years, at least since this Court's decision in (1957) *Conley*, it has been clear

that the rules promulgated by this Court in 1938 mean what they say, and that no such byzantine paper exercises are necessary to state a claim consistently with Rule 12(b)(6).

E. Plaintiffs also have sufficiently alleged facts suggesting conspiracy to restrain in-region competition from CLECs.

Plaintiffs also allege in detail that Defendants shared a common motivation to agree to prevent effective competition from CLECs. Allowing successful competitive entry by a CLEC in one territory would have "revealed the degree to which competitive entry by CLECs would have been successful in other territories in the absence of such conduct." Cplt. ¶ 50. Also, successful competitive entry into a Defendants' territory would have encouraged other CLECs to attempt to enter other territories controlled by Defendants. *Id.* Thus, Defendants had a compelling common motivation to block CLECs' access to their markets, protecting one another from competition from CLECs. *Id.* The Complaint sets forth a dozen detailed forms of parallel conduct in which all Defendants engaged in order to prevent in-region competition from CLECs. That detail provides Defendants with exquisite notice of Plaintiffs' claims, which is far more than the most that could be required under *Swierkiewicz*. In sum, Plaintiffs have far more than fulfilled the notice pleading requirement articulated in Rule 8(a) and forcefully applied by the Court in *Swierkiewicz*, making both direct and inferential allegations of an antitrust conspiracy, providing the time period during which it operated, identifying its participants, and describing its effects. To require more would be to abandon the principles of notice pleading articulated by this Court repeatedly in *Swierkiewicz*, *Leatherman*, and *Conley*.

VI. Petitioners Disagree Mainly With The Second Circuit's Conclusion That Plaintiffs' Extensive Allegations Of Fact Make A Conspiracy Plausible, Which Is Not An Issue Appropriate For Certiorari.

Under Supreme Court Rule 10, certiorari should rarely be granted "when the asserted error consists of erroneous factual findings. . . ." Certiorari should not be granted in this case because at bottom, Petitioners' real quarrel with the decision below lies in their disagreement with the Second Circuit's conclusion, based on the extensive and detailed allegations outlined above, that the detailed allegations referenced above provide a "sufficient factual predicate" on the basis of which to conclude that the allegation of conspiracy is "plausible." Both elements – the pleading of a "factual predicate" and the "plausibility" of an inference of conspiracy from that predicate – are clearly required by the Second Circuit's opinion, and were found by the Second Circuit to be amply satisfied in this case.

The Second Circuit's opinion holds that an antitrust claimant "must allege . . . a sufficient supporting factual predicate on which that allegation [of conspiracy] is based." Pet. App. 25a. *See also* Pet. App. 23a (a plaintiff must allege a conspiracy "together with the factual predicate upon which those assertions are made"). Summarizing in detail the "several factual bases for [Plaintiffs'] far-reaching claims of a two-pronged antitrust conspiracy" (Pet. App. 5a-8a), the Second Circuit concludes that a clear "factual predicate" for an inference of conspiracy has been alleged. By contrast, Petitioners broadly assert that all that is alleged is "innocuous" conduct coupled with a "bald assertion" of conspiracy (Pet. 1, 11), thereby turning a blind eye to the extensive supporting facts actually pleaded by the Plaintiffs, and essentially asking this Court to disagree with the Second Circuit about the extent of the allegations that were made. Under Supreme Court Rule 10, such a disagreement with a Circuit Court's carefully-considered evaluation of detailed facts alleged in a complaint is not a satisfactory basis for a writ of certiorari.

As to how convincing such facts must be to survive a motion to dismiss, the Second Circuit held that "[t]he factual predicate that is pleaded does need to include conspiracy among the realm of plausible possibilities", Pet. App. 19a, and that "the pleaded factual predicate must include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss." Pet. App. 25a. Applying that standard, the Second Circuit examined some of the specific and detailed allegations made in Plaintiffs' complaint (Pet. App. 30a-32a), and concluded that they amply satisfy the "plausibility" standard that it has articulated. Pet. App. 33a. Indeed, as the Second Circuit opinion points out, Plaintiffs have not only alleged sufficient facts to make an inference of conspiracy "plausible", *but have alleged plus factors of the type that conventionally can defeat summary judgment*, making it "particularly difficult to conclude that the allegations contained in the complaint are insufficient to state a claim." Pet. App. 32a-33a n.15. By contrast, Petitioners simply pretend that nothing more than "parallel conduct" has been alleged (Pet. 13-14), thereby essentially asking this Court to disagree with the Second Circuit's conclusion that the detailed supporting facts alleged in this case make an inference of conspiracy "plausible." Such a disagreement with a Circuit Court's thoroughly-considered judgment about what is a reasonable inference from specific alleged facts is no basis for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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